Filed 6/14/07 P. v. Pratt CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RUBEN HERSHELL PRATT,<br><br>Defendant and Appellant. | D046844<br><br><br><br>(Super. Ct. No. SCD181609) |

APPEAL from a judgment of the Superior Court of San Diego County, Gale E. Kaneshiro, Judge. Affirmed in part; reversed in part.

I.

INTRODUCTION

A jury found Ruben Hershell Pratt guilty of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b))[1] (count 1), and assault with a firearm (§ 245, subd. (a)(2)) (count 2). With respect to both counts, the jury also found that Pratt personally used a

firearm with the meaning of section 12022.5, subdivision (a)(1). After the jury returned its verdict, Pratt admitted that he had suffered a prison prior (§§ 667.5, subd. (b), 668), a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7 subd. (c)), and a strike prior (§§ 667, subds. (b)-(i), 668, 1170.12).

At Pratt's sentencing hearing, the trial court granted Pratt's motion to strike his strike prior.[2] The court sentenced Pratt to a total term of 15 years in prison, consisting of the midterm of six years on count 1, the midterm of four years on the accompanying firearm enhancement, and five years on the prior serious felony enhancement. The trial court stayed the sentence on count 2 and the accompanying firearm enhancement pursuant to section 654. The court also stayed the sentence on the prison prior enhancement.

On appeal, Pratt claims the trial court erred in excluding evidence that another suspect might have committed the offenses. Pratt also claims that his conviction for assault with a firearm (§ 245, subd. (a)(2)) (count 2), must be reversed because assault with a firearm (§ 245, subd. (a)(2)) is a lesser included offense of assault with a semi-automatic firearm (§ 245, subd. (b)) (count 1).

We conclude that the trial court did not err in excluding the evidence of third party culpability. With respect to the lesser included offense issue, the People properly

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 The People concurred in Pratt's motion to strike the strike.

concede that the court erred. We reverse the judgment as to count 2, and affirm the judgment in all other respects.

## II.

## FACTUAL BACKGROUND

### A. *The People's evidence*

On March 29, 2004, at approximately 6:07 p.m., Todd Groessl stopped his sports utility vehicle (SUV) at the intersection of Howard Street and Idaho Street in the North Park area of San Diego. The driver's side window of Groessl's SUV was rolled down. Pratt walked across the intersection in front of Groessl's vehicle, in an "inconsiderately slow" manner, according to Groessl. As Pratt crossed in front of the car, Groessl said to Pratt, "Do you think you could move any slower?"

Pratt threw his arms in the air and said, "What? What did you say?" Pratt stood in front of Groessl's vehicle for a few moments, and then spit on the vehicle. Groessl then called Pratt a "dumb ass." Pratt told Groessl to get out of his car. Instead, Groessl drove away, toward his house. Groessl arrived at his house approximately 20 seconds later. As he was parking his car, he saw Pratt walking toward him.

After another confrontation between Groessl and Pratt, while the two were standing approximately four feet apart, Pratt pulled out a handgun from his pants pocket with his right hand. Pratt cocked the gun, pointed it at Groessl's face, and said, "What do you have to say to me now?" Pratt then spit at Groessl. Groessl responded, "You're a real man," then turned and walked toward his house. Once inside, Groessl called 911.

Police received Groessl's call at approximately 6:18 that evening. San Diego Police Officer Jonathan Wiese responded to the area to look for a suspect. Officer Wiese saw a man who matched the description of the suspect in the 4100 block of Oregon, near the North Park recreation center. The man, later determined to be Pratt, was wearing a red baseball cap, a red jacket, a white shirt, and blue jeans. Pratt was carrying a drink cup from Wendy's restaurant.

At approximately 6:35 p.m., a second police officer brought Groessl to the scene where Pratt was being detained. Groessl saw Pratt sitting on the curb from a distance of no more than 40 feet. When Groessl saw Pratt, he told the officer, "That's him without a doubt. I'm 100 percent positive."

The next day, Groessl learned from police that the gun used in the crime had not been found. Police also told Groessl that Pratt had been carrying a cup from a Wendy's restaurant when he was detained. The morning after learning this information from police, Groessl went to a nearby Wendy's restaurant and looked in the bushes for the gun. Groessl found a gun that looked "just like" the gun used in the incident. Groessl called police, who retrieved the gun. Police were unable to lift any fingerprints from the gun.

B. *The defense*

Pratt testified that on the day in question, he had taken the bus to the North Park area of San Diego to visit his cousin. After he got off the bus, he ate at a Wendy's restaurant, and then began walking toward his cousin's house. On the way to his cousin's house, police stopped him. Pratt denied that he committed the offenses. Pratt's cousin,

Mahron Brown, testified that on the day of Pratt's arrest, Brown had been expecting Pratt to visit him at his house.

## III.

## DISCUSSION

### A. *The trial court did not err in excluding evidence of third party culpability*

Pratt claims the trial court erred in excluding evidence that another suspect might have committed the offenses.

#### 1. *Factual and procedural background*

During a September 9, 2004 pretrial hearing, the trial court noted that it was the court's understanding that "there was another young man who, at least in general terms, is of similar description to the defendant and that person was released after the defendant was identified by the victim." The court further noted that it was the court's understanding that if the defense were to "point[] the finger" at this third party, the People intended to have the third party testify and deny that he committed the crime.

The prosecutor responded to the court, agreeing that, "if . . . [the defense] open[s] the door in any way," the People would have the third party testify in rebuttal. Defense counsel then clarified that Pratt did not intend to present evidence that this third party committed the crime, stating:

> "Mr. Pratt, through his counsel, is going to be denying participation in this event. That is not to say that we are going to say Mr. Berry [the third party] did it at all. All we are going to be saying is that whoever the perpetrator was, it was not Mr. Pratt."

On January 18, 2005, at another pretrial hearing, the prosecutor sought further clarification as to whether the defense intended to present evidence pertaining to Berry:

> "[Prosecutor]: "Your honor, there is a young man by the name of Vincent Berry. Mr. Berry was wearing clothing that matched the defendant's clothing at the time of the incident, and he was detained at the time. I thought it would make perfect sense if the defense chose to go with that theory, was [*sic*] to say that maybe Berry committed the offense and not the defendant, since he was nearby, African-American young man wearing similar clothing. He was arrested ─ detained nearby. I'm prepared to have Mr. Berry testify and tell the jury that he had nothing to do with it. If that's the defense posture, then in limine, just to let the court know at the prior trial [*sic*] [defendant's prior defense counsel] said he was not going to blame Berry at all, so I was excluded from mentioning Berry or bringing in Berry. I just want to let the court know that I would like to know ahead of time, if possible."

The issue was not addressed again until April 4, 2005, at another pretrial hearing. At that hearing, the court ruled that the evidence of third party culpability would not be admitted:

> "[Prosecutor]: Your Honor, we dealt with this issue before and [defense counsel] and previous counsel had indicated they would not seek to blame a man, Vincent Berry, for this offense, and I just want the record to be clear on this issue, if I may inform the court what I mean.
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> "During ─ right after the commission of the crime, the victim reported the crime to the 911 operator. The suspect['s] description went out on the police radio, et cetera. The police arrested the defendant, detained the defendant, then detained, a second individual who ─ who somewhat matched the description of the assailant ─ of the defendant. They were young African-Americans, similarly dressed, et cetera.
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> "The police then detained both men and brought the victim over to do a curbside. The victim then immediately identified the defendant and they let the second individual go. His name is Vincent Berry. . . . I wanted an indication from counsel as to whether or not

> they would argue that Vincent Berry was the assailant, not the defendant, and they before said they wouldn't go that route. And that's important to me, because the officers need to be admonished of that fact and the 911 tape needs to be sanitized as to that issue. That's been done before. That was done before, and I'm ready to go on those issues. But I want clarification on the record as to how counsel intends to proceed, because then that would dictate my strategy.
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> "The court: Okay. Mr. [defense counsel], then, this is the People's motion to preclude third-party suspect evidence.
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> "[Defense counsel]: Your honor I'm not saying that this other person who was detained did it. I am not saying that he didn't. I can't say he didn't and I'm not saying that he did. I think there was some unintended misleading in reference to the curb[side] lineup, in that the two individuals were not together. They were at two different locations. So there were . . . was a curb[side] lineup that took place. The victim said, regarding Mr. Pratt, 'That's him,' so they didn't take him to the second location. It wasn't a situation where both men were there. I'm not saying that this person did it, but I certainly can't say he didn't do it.
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> "The court: Okay. I will grant the People's request that any . . . third-party suspect evidence will [be] precluded and excluded from this trial. It only becomes relevant if there is evidence that a third party, in fact, committed the crime, and there is no evidence that defense can show that this party was even involved in the matter. So . . . third-party suspect evidence will be excluded."

2. *Governing law*

"[T]he Constitution permits judges 'to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, ___ [126 S.Ct. 1727, 1732-1733] [stating that evidentiary rules that preclude the admission of third party culpability evidence that does not sufficiently connect the third person to the crime are "widely accepted"].)

In *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*), the California Supreme Court discussed the standard a trial court is to apply in considering whether to admit defense evidence tending to show that a third party is guilty of the charged offense. The *Hall* court noted that it was clarifying the so-called *Mendez-Arline* rule (*People v. Mendez* (1924) 193 Cal. 39 (*Mendez*), overruled on another ground by *People v. McCoughan* (1957) 49 Cal.2d 409, 420; *People v. Arline* (1970) 13 Cal.App.3d 200 (*Arline*)), a rule that had suggested that a defendant would have to demonstrate a "substantial probability" of third party guilt before such evidence would be admitted. (*Hall, supra*, 41 Cal.3d at p. 829.)

In clarifying the law in this area, the *Hall* court stated:

> "We reject *Arline* to the extent that it creates a distinct and elevated standard for admitting this kind of exculpatory evidence. Rather than speaking in terms of a *Mendez-Arline* 'rule,' courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evidence Code] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evidence Code] § 352)." (*Hall, supra*, 41 Cal.3d at p. 834, fn. omitted.)

However, in describing when such third party culpability evidence is relevant, the *Hall* court relied on *Mendez, supra,* 193 Cal. 39, in holding:

> "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in *Mendez*, evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence*

*linking the third person to the actual perpetration of the crime*." (*Hall, supra,* 41 Cal .3d at p. 833, italics added.)

3. *The trial court did not err in excluding the evidence*

Pratt's primary claim on appeal is that the trial court applied the "wrong standard," in excluding the evidence of third party culpability.[3] Pratt claims that the trial court's statement that such evidence was inadmissible unless "there is evidence that a third party, in fact, committed the crime," suggests that the court applied the "old *Mendez-Arline* test [that] was soundly *rejected* by our Supreme Court in *Hall*."[4]

However, as is indicated by the italicized portion of the quotation from *Hall*, the *Hall* court *relied* on *Mendez, supra,* 193 Cal. 39, in holding that evidence of third party culpability is inadmissible unless there is "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra,* 41 Cal .3d at p. 833.) Thus, the trial court's statement that a defendant must present "evidence that a third party, in fact, committed the crime," accurately paraphrased the *Hall* standard. Further, there is

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[3] Pratt comments in his reply brief that it is "noteworthy" that the prosecutor did not seek to have the evidence excluded in the trial court. While it is not entirely clear from the prosecutor's comments whether he was seeking to have the evidence excluded, the trial court unambiguously characterized the prosecutor's comments as reflecting a "motion to preclude third-party suspect evidence." Thus, defense counsel was clearly on notice that the court was considering whether to exclude the evidence.

Further, the reporter's transcript does not clearly indicate that Pratt intended to offer the evidence of third-party culpability at trial, or that defense counsel objected to the trial court's ruling excluding the evidence. However, the People do not argue on appeal that Pratt has forfeited this claim. Accordingly, we assume for purposes of this decision that Pratt has not forfeited this claim by failing to object to the trial court's evidentiary ruling.

nothing in the record that suggests that the trial court applied the "substantial probability" standard that the *Hall* court rejected. (*Hall, supra*, 41 Cal.3d at p. 829.) For these reasons, we reject Pratt's claim that the court applied the wrong legal standard in excluding evidence of third party culpability.

We also reject the suggestion in Pratt's reply brief that the evidence was inadmissible under the *Hall* standard. A trial court's exclusion of evidence of third party culpability is reviewed for an abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 577-578.)

The evidence of third party culpability that was before the court at the time of its ruling was that Berry "somewhat matched the description of the assailant," in that they "were young African-Americans, similarly dressed." We conclude that the trial court did not abuse its discretion in determining that this evidence did not constitute direct or circumstantial evidence linking Berry to the crime. The evidence thus did not constitute relevant evidence of third party culpability. Further, we reject Pratt's suggestion that the prosecutor's comment during the January 2005 hearing that it would make "perfect sense," for Pratt to rely on such third party evidence establishes that the trial court abused its discretion in excluding the evidence. The prosecutor's comment, made in the context of a request to determine whether the defense intended to offer the evidence, is irrelevant to a determination of whether the evidence was admissible under *Hall, supra,* 41 Cal.3d 826.

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4 Pratt misquotes the trial court as stating such evidence would not be admitted

Finally, we reject Pratt's argument that the trial court erred in failing to balance the relative probative and prejudicial value of the evidence of third party culpability. Because the trial court did not abuse its discretion in ruling that the evidence was irrelevant, the court was not required to balance the probative value against the prejudicial effect of the evidence pursuant to Evidence Code section 352.

B. *The conviction on count 2 for assault with a firearm must be reversed because it is a lesser included offense of count 1, assault with a semiautomatic firearm*

Pratt claims his conviction on count 2, assault with a firearm (§ 245, subd. (a)(2)), must be reversed because assault with a firearm (§ 245, subd. (a)(2)) is a lesser included offense of assault with a semiautomatic firearm (§ 245, subd. (b)), the offense charged in count 1. The People properly concede that Pratt may not be convicted of both offenses.

A defendant may not be convicted of both a greater offense and a lesser included offense. (E.g., *People v. Pearson* (1986) 42 Cal.3d 351, 355.) "If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran* (1970) 1 Cal.3d 755, 763.) "[I]f the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) " '[A] statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. . . . ' " (*Id*. at p. 1229.)

In this case, the greater offense, assault with a semiautomatic firearm (§ 245, subd. (b)), includes all of the elements of the lesser offense, assault with a firearm (§ 245, subd.

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"unless there was evidence that the third-party had actually committed the crime."

(a)(2)). Therefore, Pratt may not be convicted of both offenses. Accordingly, we reverse the conviction on count 2, assault with a firearm.

IV.

DISPOSITION

The judgment is reversed as to count 2. The judgment is affirmed in all other respects.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.